The Solicitors' Journal

VOL. LXXXIV. **Saturday, November 30, 1940.** No. 48

Editorial, Publishing and Advertisement Offices: 29–31, Breams Buildings, London, E.C.4. Telephone: Holborn 1853.
SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.
Annual Subscription: £2 12s., *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 1d. *post free*
CONTRIBUTIONS: Contributions are cordially invited, and must be accompanied by the name and address of the author (not necessarily for publication) and be addressed to The Editor at the above address.
ADVERTISEMENTS: Advertisements must be received not later than 1 p.m. Thursday, and be addressed to The Manager at the above address.

Current Topics.

The House of Lords.

WHILE sitting in its judicial capacity the House of Lords is normally constituted of five members, although this number is sometimes exceeded, as it was quite recently when seven lords took part in the hearing of an important appeal. The presence of three is sufficient to constitute the House, and recently the latter number only was in attendance when a question as to the validity of a trade mark was argued. On that occasion it was of interest to note that the three law lords present—VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, and LORD ROMER, were inter-related, and might truly be called brothers-in-law in the double sense of that term. VISCOUNT MAUGHAM, who was on the woolsack, as will be remembered, married a sister of LORD ROMER, while the latter and LORD RUSSELL OF KILLOWEN married sisters. The quorum thus formed quite a family party—probably a unique experience in the judicial history of the House. It will be noted also that all three law lords represented the Chancery side of the law.

The President of the United States and the Judiciary.

WHILE the re-election for a third term of Mr. ROOSEVELT as President of the United States is unprecedented in the history of his country, thus testifying to the immense influence he has exerted, it is of interest to note that although as President he is invested with very extensive powers in the selection of judges for the Supreme Court, the nominations require confirmation by the Senate. The fathers of the Constitution were naturally and properly anxious to secure the complete independence of the judiciary, rightly regarding this as a bulwark both for the people and for the States against any possible aggression of Congress or President. Again and again, as the late LORD BRYCE reminded us in his classic volume on the "American Commonwealth," attempts have been made to alter the tenure of the judges, and particularly to make it endure for a term of four or six years only, but Congress wisely rejected the proposal when mooted, a result properly regarded with great respect and of persuasive force.

Preservation of Records.

The Law Society's Gazette again draws attention to the valuable work performed by the British Records Association in saving from destruction valuable material which might otherwise be lost in the delivery up of documents from solicitors' offices for pulping. The Association, it is recalled, offers facilities free of charge for the examination of accumulations of papers in solicitors' offices with a view to discovering what papers are of historical value and should be retained. The Council of The Law Society is informed that, although many solicitors have permitted the association to examine papers which are about to be pulped, on the whole the response has been somewhat disappointing. It appears, for example, that a member of the association who visited a number of firms in the Midlands has reported while some firms gave every possible assistance, others disposed of their accumulations without there being any scrutiny by an expert, with the result that many documents of great historical and antiquarian interest must have perished. Our contemporary states that the classes of documents it is particularly desired to save from destruction are the various kinds of manorial documents and the records of time-expired commissions and defunct boards dealing with highways and similar matters. Many of these have been received in a fiduciary capacity by the predecessors of existing firms of solicitors, and it is felt that it is only right that the present partners in such firms should not destroy such documents indiscriminately, but allow an opportunity for expert examination. Any member of The Law Society who is proposing to dispose of accumulations of documents among which it is possible that anything of value may be found is therefore asked to communicate with Mr. C. T. FLOWER, Chairman, The British Records Association, Records' Preservation Section, 8, New Square, Lincoln's Inn, W.C.2.

The Country Solicitor.

THE present position is admirably dealt with in a recent report of the Northamptonshire Record Society on visits made by the Hon. Secretary to solicitors' offices in several counties with the object of discovering what, if any, records of historical interest were in their custody, and of securing the preservation of such records from destruction. It is pointed out that for the past 200 to 250 years the work of local administration in England, apart from the activities of parish officers, has been carried out with the help of the country solicitor, who has not only acted as part-time clerk of the peace to justices of petty and quarter sessions and as town clerk to cities and boroughs, but has also (from the early part of the eighteenth century) officiated as clerk to various statutory bodies, such as commissions for the inclosure of open fields, turnpike trusts and drainage commissions. Moreover, during the last century, when the parish was for many purposes being superseded as a unit of local government by "*ad hoc*" authorities in larger areas, the solicitor was again in request as clerk for boards of guardians, boards of health, rural sanitary authorities and their successors the urban and rural district councils. Other activities of a public nature were involved in his appointment to such offices as clerk and treasurer, and as secretary and legal adviser, to local organisations of many kinds, such as trade unions and associations for the prosecution of felons; while in private practice the country solicitor acted for centuries as steward of manor courts, and his office has often been made the repository not only for the court rolls but for the title deeds of his clients. These varied activities (the report states) have produced large accumulations of records, but, except with

regard to the records of quarter sessions, no statutory provisions have been made for their safe custody. The paper room of the country solicitor gradually became, in effect, the local public record office, though the records of the boards of guardians were usually kept in the workhouses and, with them, the records of rural district councils. Curiously enough the solicitor's offices as a repository of historical records appears to have been overlooked alike by Royal Commissions, which have issued reports since 1800, and by the Historical Manuscripts Commission, which has issued many reports since its establishment in 1869.

Preventing Destruction.

THE Northamptonshire Record Society has for a number of years been in touch with a few firms of solicitors in the county and has from time to time received valuable deposits of records. Knowledge of what is described as the calamitous and wholesale destruction of records which took place during the last war led the society to take more active measures in 1939, and a meeting of the Northampton and District Law Society, at which the thirty-nine solicitors present were addressed by the Hon. Secretary of the Northamptonshire Record Society, was followed by a circular letter sent to solicitors within or just beyond the county borders asking for permission to inspect records and documents scheduled for destruction. This request was followed by personal visits. The outbreak of war prevented much being done at the time, but it was hoped that appeals by the Master of the Rolls and the British Records Association, together with the society's own representations and propaganda carried on for many years, and correspondence in *The Times* and other newspapers, would deter solicitors from further destruction without expert advice from the historical point of view. This hope has not been fully realised. In pursuance of a resolution of the council of the society passed in July, 1940, a number of firms were again circularised and visited personally, and the report contains brief but important notes on the results of these visits to thirty-six firms, most of them of old standing, in eighteen towns in seven counties. Typical entries are: "A great destruction during the war of 1914–18"—"A very old firm. Wholesale destruction of all not in current use in July, 1940"—"Two lorry loads destroyed in 1939"—"A couple of lorry loads disposed of recently"—"Destruction in 1940 of everything not in current use except a handful of late deeds"—"No destruction. The paper room is full. Permission to inspect"—"No recent destruction and possibilities of good finds here." Examples might be multiplied both of the irreparable losses which have been sustained, and of what has been saved by the efforts of the society, but space does not permit. We would, however, conclude by recording the entry in reference to one firm as an example of the beneficial results of co-operation between the practitioners concerned and the society. It appears that seventy-six sacks and four or five packing-cases of records were deposited with the society by this firm in 1935. The entry continues: "Obviously practically everything for some two centuries had been preserved. A very great variety of types of public and private records here, dating from the thirteenth century, including, *inter alia*, a large number of manor court rolls, early railway and canal papers, records of turnpike trusts, inclosure commissions, records of parish officers and other local officials, expired leases, deeds, surveys, rentals and accounts, and election miscellanea. This collection may well become the classical example for the whole country of what may be found in the office of a country solicitor where no ruthless destruction has taken place."

War Damage, Disclaimer and Possession.

THERE are circumstances in which tenants whose premises have been rendered unfit should think twice, if quickly so, before serving their landlords with notices of disclaimer under s. 4 (2) (*a*) of the Landlord and Tenant (War Damage) Act, 1939. For the effect of such a notice is that, as from the date of service, the lease shall be deemed to have been surrendered (s. 8 (2) (*a*)), and the landlord is consequently entitled to immediate possession. In many cases the right thus brought into being will cause the landlord little gratification; but there are occasions when valuable fittings may be capable of being salved, and the tenant who has precipitately disclaimed will then either have to see these pass to the landlord or make an application to modify the consequences of his own rash haste under s. 9 (1) (*d*). It is true that, subject again to the wide powers of the court under s. 9 (1), rent will accrue due while the tenant is making up his mind whether and when to disclaim, but, even when his landlord forces the pace by serving a notice to elect under s. 4 (3), he has—subject this time to judicial discretion conferred by s. 5 (4)—a month in which to decide.

Minimising Air-raid Damage.

IN our issue of 28th September we referred, in the course of a "Current Topic" under the above heading, to certain views which had been expressed by two architects concerning damage caused by bombs. It was suggested that suction due to the vacuum caused by the explosion, rather than the outward blast, was the cause of damage in the vicinity, and arguments for the theory were drawn from observation and from the effectiveness of precautions taken on the assumption that the theory was correct. Work which has been undertaken by the Research and Experiments Department of the Ministry of Home Security relative to the danger of flying glass indicates, however, that it would not be correct to draw from the above-mentioned theory the conclusion that windows may be relied upon to burst outwards. According to a recent note on the matter in *The Times* the direct pressure of the blast from an exploding bomb may force in a window, or the suction following the pressure may pull it outwards. When a pane breaks under severe blast, pieces may be scattered violently, and it is not possible to foretell whether the pieces will fly inwards or outwards. When a pane breaks under distant blast, pieces generally fall inside and outside within a few feet. It appears that while the minimum distance from an explosion at which plate-glass will escape damage cannot be predicted, within 200 feet its chance of survival is small. Beyond that distance the chance of survival depends on facts which include the size and thickness of the pane, the frame fixing, the size of the bomb and the method of detonation, and, in particular, the reflection of the blast waves from adjacent buildings. This last factor, it is stated, is chiefly responsible for the apparently freakish fracture of windows. As to precautionary measures, it is stated that materials stuck on glass have proved effective in preventing fragments flying, though they do not prevent windows from being broken. The cheapest and simplest material to use is cotton or linen fabric, stuck all over the glass with paperhanger's paste. Net curtain materials are also said to be very good; and brown paper works well, but it must be tough and thick. Bracing devices to strengthen windows and so reduce the chance of their breaking have been tested, but it is stated that it has not been found that any of them gives any appreciable increase in the resistance of the glass to blast from bombs. Plate-glass windows 3–16 inches thick or more, which are usually those of shop fronts, restaurants and hotels, are prone to damage by blast because of their large areas, and the protection of the interior lit by the window is desirable. Small panes of plate-glass are relatively strong but may fail by the frame breaking. Fastening doors wide open and, generally, the opening of windows, are advocated during raids. On the general question whether windows which are open are less likely to be shattered than those which are closed, much, it is said, depends on the type of window, though, as a rule, the open window is less likely to suffer damage.

The Black-out: Enforcement.

QUESTIONS were recently asked in the House of Commons concerning instructions given to the police and air-raid wardens with regard to judging the adequacy of the black-out as applied to private dwelling-houses, it being urged that the duty of enforcing the law was carried out with a great deal of differentiation. In answer, Mr. MABANE recalled that the Lighting Order required lights in private dwelling-houses to be completely obscured so as to be altogether invisible from outside. The instructions given to the police were that, while every effort should be made to secure complete obscuration, they should exercise a reasonable discretion in enforcing the requirements by proceedings in court. Air-raid wardens had no power to enforce the order, but they co-operated with the police by local arrangement. Mr. MABANE stated further that he was aware that there were differences in the way in which the matter was carried out, but he thought that in general the police and wardens acted with great discretion. They did not prosecute without warning being given or unless there was some flagrant breach.

Superannuation Schemes: War Service.

THE Ministry of Labour and National Service recently, indicated that A.R.P. workers and war-time policemen who leave their peace-time employment for civil defence can have their superannuation rights preserved under the Superannuation (War Service) Act. The Minister has recently certified further jobs as employment for war purposes which will enable trustees of superannuation schemes to preserve the rights of employees who take up any of the prescribed occupations. These occupations are as follows: Whole-time employment in any of the civil defence services; whole-time employment

as a member of the first class of the police reserve, or as a re-engaged police pensioner serving in a police force for the purposes of the present emergency; as a member of the police war reserve; as a special constable under the provisions of the Special Constables Orders; as a member of the Women's Auxiliary Police Corps; or otherwise as a constable for the purposes of the present emergency.

Traffic Lights: Visibility.

A WRITER to the *Sunday Times* recently stated that renewed attention is being given to the question of making traffic signals more clearly visible in daylight. It is recalled that last March the authorities agreed that the existing cross-slots were inadequate by day, and that in July the Ministry of Transport announced that highway authorities had been informed that in such cases half-circles could be shown, provided that the signals were fully masked at night. There had in many cases been considerable delay in effecting the necessary, or at least desirable, improvement in visibility, but an official of the Ministry has explained that work on the lights had to be put aside while the highway authorities were dealing with more urgent matters. The plan has not, however, been dropped, and it would appear that from inquiries which have been received by the Ministry from highway authorities in all parts of the country that many traffic signals will shortly be fitted with the necessary shutters. The shutters are made of steel and there may well be some delay in obtaining deliveries.

Defence (Finance) Regulations.

THE attention of readers should be briefly drawn to amendments effected in the Defence (Finance) Regulations, 1939, by a recent Order in Council (S.R. & O., 1940, No. 1989), which empower the Treasury, when granting permission to make any payment to a non-resident, to make that permission conditional upon payment being made to a blocked account with a banker authorised to hold such accounts. The object is to prevent the transfer into foreign currency of certain capital payments to non-residents, of which cash legacies the redemption proceeds of securities (other than 3 per cent, Defence Bonds and National Saving Certificates), and the proceeds of sales of real estates are examples. Sums paid to blocked accounts may be invested in securities specified in a list published by the Treasury, and interest on such securities will be dealt with in the same manner as interest on other securities held by a non-resident.

Rules and Orders: Land Charges.

THE attention of readers should be drawn to the Land Charges Rules, 1940, which are set out on p. 671 of this issue. They provide that the number of days prescribed by s. 4 (1) of the Law of Property (Amendment) Act, 1926, for the giving of a priority notice under that subsection shall be at least fourteen days before registration is to take effect; and that the number of days before the expiration of which a purchase must be completed in order to give a purchaser who has obtained an official certificate of search the protection provided by s. 4 (2) of the said Act shall be fourteen days after the date of the certificate. The effect of the order is to substitute fourteen days for two days in the above cited subsections.

Recent Decisions.

IN *G. H. Renton & Co., Ltd.* v. *Black Sea and Baltic General Insurance Co., Ltd.* (*The Times*, 21st November), Lord CALDECOTE, C.J., held that goods covered by a policy of marine insurance had reached their "final destination" within the meaning of the policy when they were deposited by the ship on to the quay. All the insured goods were discharged at the Surrey Commercial Dock, London, and were received and piled by the Port of London Authority. When delivered to the plaintiffs it was found that some of them were missing. In these circumstances the plaintiffs were not entitled to recover under the policy.

In *Middows, Ltd.* v. *Robertson; W. W. Howard, Brothers and Co., Ltd.* v. *Kann*; and *Forestal Land, Timber and Railways Co., Ltd.* v. *Rickards* (p. 669 of this issue), the Court of Appeal (SCOTT, MACKINNON and LUXMOORE, L.JJ.), reversing a decision of HILBERY, J., held that where British cargoes which were on German ships at the outbreak of war had been lost either by scuttling of the ships or by being taken to a German port, the owners were entitled to recover against the insurers. In each case the loss was one to which were attached the requisite attributes of a constructive total loss as laid down in s. 60 of the Marine Insurance Act, 1906.

Finance Regulations.

Consolidation and Amendments—IV.

IN the past weeks many amendments have been made in the Defence (Finance) Regulations. The general trend of these amendments has been towards a greater stringency in the regulations, though some of them seem more to be for the sake of greater convenience in operating, as, for example, the establishing of further Treasury special accounts and sterling area accounts. It is noticeable and perhaps significant that the regulations now deal with Newfoundland dollars and Philippine pesos, indicating that, like American dollars, these foreign currencies are becoming sought after and valuable. In this article it is proposed to deal with three of the recent developments in this field of war-time legislation

Compulsory Acquisition of Foreign Securities.

The Treasury's power to acquire foreign securities, which has been previously discussed in these articles (84 SOL. J. 339, 555) arises under reg. 1 of the Defence (Finance) Regulations, 1939. This power is to be used for the strengthening of the financial position of the United Kingdom, and several further steps in this connection have recently been taken. There has been added to the list of securities for which a return has to be made to the Bank of England, Canadian National Railway Company, successor by amalgamation to the Grand Trunk Railway Company of Canada, Perpetual 4 per cent. Consolidated Debenture Stock. The order imposing this obligation to make the return is the Securities (Restrictions and Returns) (No. 3) Order, 1940 (S.R. & O., No. 1863). It is in very similar terms to the previous Securities (Restrictions and Returns) (No. 2) Order, 1940, except that the return must be made within fifteen days of the coming into force of the Order, which is the 26th October, 1940.

A number of orders compulsorily acquiring various securities for which returns had been previously made have been issued. These are the Acquisition of Securities (No. 3) Order, 1940 (S.R. & O., No. 951), coming into force on the 14th June, 1940, the Acquisition of Securities (No. 4) Order, 1940 (S.R. & O., No. 1864), and the Acquisition of Securities (No. 5) Order, 1940 (S.R. & O., No. 1865), both coming into force on the 26th October, 1940. Very recently, on the 16th November, 1940, another of these orders—the Acquisition of Securities (No. 6) Order, 1940 (S.R. & O., No. 1979)—has been issued. By the first of these orders, Dominion of Canada 4 per cent. Stock became vested in the Treasury; the second of the orders deals with a large number of Canadian stocks and bonds, for details of which the schedule to the order should be consulted; the third of the orders takes over the above mentioned 4 per cent. Debenture Stock of the Canadian National Railway Company; whilst the last one deals with the taking over of a series of American securities, for fuller details of which the schedule should again be consulted. The (No. 4) and the (No. 6) Acquisition Orders (S.R. & O., Nos. 1864 and 1979) contain some further details; they are not to apply to any securities with respect to which an order or certificate of exemption under reg. 5A (1) has been made or granted; nor are they to apply to securities sold, in accordance with the permission of the Treasury, to a person not resident in the United Kingdom, the Isle of Man or the Channel Islands. Further, when the orders speak of "returns," this is to be deemed to include a return made after the date by which it ought to have been made and also returns made under the Securities (Restrictions and Returns) (Jersey) Order, 1939, and the Securities (Restrictions and Returns) (Guernsey) Order, 1939, and accepted by the Bank of England as returns made under the Securities (Restrictions and Returns) (No. 2) Order, 1940.

Exemptions from the provisions of reg. 1 may be made by the Treasury under the powers contained in reg. 5A. Two further exemption orders have recently been made. By the Securities (Exemption) (No. 2) Order, 1940 (S.R. & O., No. 972) exemptions were granted in the case of various Government and city loans of several South American countries and of Egypt. The Securities (Exemption) (No. 3) Order, 1940 (S.R. & O., No. 1761), has granted a similar exemption from the provisions of reg. 1 to various Government, provincial and city loans of Belgium, France, Holland and Norway, which are in the currencies of those countries.

Restrictions on Payments.

Several further developments in the restriction of payments arising under reg. 3C have taken place, but no drastic alterations in the general scheme have been made. Three further countries have been brought within the sphere of control and minor alterations have been made in the case of several others.

Three orders, the Regulation of Payments (General Exemptions) (Amendment) (No. 3, No. 4 and No. 5) Orders, 1940 (S.R. & O., Nos. 1635, 1778 and 1958), which are in the form common to the previous orders of this type, add Uruguay, Bolivia and Chile, respectively, to the list of countries to which exemptions apply. Three specialised orders dealing with these countries have been issued as well as four others replacing four former orders. These new orders are the Regulation of Payments (Uruguay) Order, 1940, the Regulation of Payments (Bolivia) Order, 1940, the Regulation of Payments (Canada and Newfoundland) (No. 3) Order, 1940, the Regulation of Payments (U.S.A. etc.) (No. 3) Order, 1940, the Regulation of Payments (Greece) (No. 2) Order, 1940, the Regulation of Payments (Hungary) (No. 3) Order, 1940, and the Regulation of Payments (Chile) Order, 1940 (S.R. & O., Nos. 1636, 1779, 1866, 1867, 1868, 1944 and 1959 respectively). The effect of these orders may be summarised briefly as follows. The methods of payment available in the cases of Uruguay, Bolivia and Chile are payments to the credit of a Treasury special account, payments by means of transfers from a Treasury special account to another such account or to a sterling area account, payments to the credit of sterling area accounts and payments by transfers from an account (not being a Treasury special account or a sterling area account) to another such account or to a sterling area account of the same person. These methods of payment are those numbered 1, 1A, 8 and 2A of the previous article (84 SOL. J. 556). Similar methods are now available in the case of payments to Hungary and Greece, sterling area accounts having apparently been instituted for these countries. The only changes, which have been introduced in the cases of Canada and Newfoundland and of the U.S.A., etc., are the allowing of the use of Newfoundland dollars and Philippine pesos if these currencies are either obtained from authorised dealers or if they have been exempted by the Treasury from acquisition under reg. 5.

Slight changes have also been made in the second parts of the orders, i.e., the parts dealing with payments made from those countries for goods exported to them. In the cases of Uruguay, Bolivia, Greece, Hungary and Chile, payments must be made in sterling obtained from the respective Treasury special accounts. Payments from the U.S.A. may be made in sterling obtained from the registered account, or in American dollars or in Philippine pesos. Similarly, in the case of Canada and Newfoundland, payments may be made in Canadian or Newfoundland dollars or in sterling obtained from an "authorised account," which is an account authorised and thus controlled by the Bank of England.

Restrictions on the Transfer of Businesses.

An important feature of the system of financial control, which has grown up, is that the transfer of shares in companies to persons outside the sterling area is rigidly controlled. This control is exercised under the powers of reg. 3A and reg. 3B which have been previously described (84 SOL. J. 339, 340, 507). The main object of these regulations would seem to be to prevent wealth in the form of such securities passing out of the sterling area and so upsetting the fixed value of sterling in the money market. They would also have the secondary effect of preventing the control of the companies passing to persons resident abroad. By a new regulation, numbered 6A, and introduced into the Defence (Finance) Regulations on the 27th September, 1940, by an Order in Council, S.R. & O., 1940, No. 1740, a still further measure of control has been introduced affecting this second aspect of the matter. Except with the consent of the Treasury, it is forbidden by para. (*a*) for any body corporate resident in the United Kingdom to transfer any trade, business or undertaking to any person who is not resident in the United Kingdom. It should be noted that the control is unusually stringent; the area within which a transfer may freely take place is the United Kingdom and not the sterling area. Further, para. (*b*) forbids the doing of any act calculated to secure or the doing of any act forming a series of acts calculated to secure such a transfer. Finally, para. (*c*) forbids the transfer of the central management or control of the trade, business or undertaking out of the United Kingdom. The usual difficulty, in the absence of any definition clause, of the meaning of residence of a company again arises.

So that there should be no delay in the trial of two cases down for hearing at the Law Courts recently Mr. Paul Ernest Sandlands, K.C., deputised for Mr. Justice Humphreys, who was ill and unable to sit in his court in the King's Bench Division. This novel course was adopted at the suggestion of counsel in the actions, Mr. Norman Fox-Andrews and Mr. P. E. Rawlins, who obtained the consent of Mr. Justice Hilbery and of the parties concerned. Mr. Sandlands was called to the Bar by the Inner Temple in 1900, and took silk in 1935.

A Conveyancer's Diary.

Statutory Trusts and Statutes of Limitation.

Re Milking Pail Farm Trusts; Tucker v. *Robinson* [1940] Ch. 996; 84 SOL. J. 514, is a very perplexing case. The decision purports to follow that of the Court of Appeal in *Re Landi* [1939] Ch. 828; 83 SOL. J. 621, which it is first necessary to recapitulate. Two persons had bought a house in the East End as tenants in common, in 1915. Till 1923 they both occupied it. Thereafter, one of them, A, received the whole rents, managed the place and kept all the profits for his own. Fifteen years or so later, the estate of the other tenant in common, B, claimed an account of the rents and profits since 1923. Before 1833 such an action would have unquestionably succeeded, as it was held to be impossible for one co-owner to possess adversely to another. But s. 12 of the Real Property Limitation Act, 1833, permitted time to run in favour of one co-owner of land against another, and thus the tenant in common in possession could get a title by time to the entirety (see, for example, *Thornton* v. *France* [1897] 2 Q.B. 143, and *Glyn* v. *Howell* [1909] 1 Ch. 666, especially at p. 677). On 1st January, 1926, however, the law of co-ownership of land was revolutionised, and, in particular, where two, three or four tenants in common of land were absolutely entitled, the land became vested in them as joint tenants upon the statutory trust to sell and hold the proceeds for themselves as tenants in common. From that day forward, therefore, where one of two former tenants in common of the legal estate received the rents from a terre tenant, he did so, not as a tenant in common of the legal estate, but as one of two joint tenants of it, and when he retained the whole net rents himself, he was not doing so as one tenant in common ousting another, but as a trustee converting to his own use income of a *cestui que trust*. From that date, therefore, it has been absolutely impossible for one "tenant in common" of land (to use a convenient but inaccurate phrase) to acquire a statutory title to the entirety, since he is always in the position of a trustee, and no trustee can acquire a title against his beneficiary. This point has been one of the "catches" well known to practitioners for several years past. I see, incidentally, that I discussed it in the first "Diary" I ever wrote on 25th January, 1936. I do not think that *Re Landi* took matters any further than to give the authority of the Court of Appeal to a point already fairly well known which had not been the subject of a previous reported decision. The point is that where A and B would have been tenants in common in fee simple but for the 1925 legislation, they must now be joint tenants on the statutory trusts. As no trustee can acquire a beneficial title against his beneficiary, no lapse of time during which A receives all the rents can give him a title to B's moiety as well as to his own.

The facts of the *Milking Pail Farm Case* were peculiar, and the report of them leaves a good deal to be desired. They raise a preliminary point as well as the main one. In 1912 the farm belonged to three sisters as tenants in common in fee simple, in equal shares. They died, respectively, in 1912, 1919 and 1923. The first to die left her one-third to the other two in equal shares. So from 1912 to 1919 the legal and equitable estates were held in moieties in fee. In 1919, the second sister died, leaving her moiety to the last sister for life with remainder to one Robinson. At this point, therefore, the remaining sister was entitled to a moiety in fee and to a life interest in the other moiety, Robinson being entitled in remainder. Finally, in 1923, she also died, leaving the moiety to which she was absolutely entitled to Robinson in fee, and causing Robinson's interest in remainder in the other moiety to fall into possession. One would have thought that at this moment all question of a tenancy in common would have ceased, as Robinson was absolutely entitled to both moieties, thus giving rise to a merger. I do not understand why this was not so, but apparently no one treated the case on this basis. Certain things had occurred, to which I next refer, but I do not see how they affect this point. In 1921, Robinson (who was then entitled only to a moiety in remainder) mortgaged his "interest in the land" to X, Y and Z to secure £3,000. This deed recited (in effect) that he expected to become absolutely entitled to both moieties, and I have no doubt the mortgagees took an interest in both moieties under it. In 1922, Robinson went bankrupt. Nothing was ever paid, either as principal or as interest, under the mortgage, and in the ordinary course of events the mortgagees' rights would have become barred in twelve years, i.e., in 1933. Personally, I think that this was the true view. But everyone concerned seems to have thought that the tenancy in common was still subsisting on 1st January, 1926. If it was so, the legal estate

clearly vested in the Public Trustee under para. 1 (4) of Sched. I, Pt. IV, of the L.P.A., since none of the earlier sub-paragraphs could have applied (see *Re Dawson S.E.* [1928] Ch. 421). It is not stated in the report what was happening to the land or to the rents from 1923 to 1940; all that we are told is that no one ever paid anything to X, Y or Z. In 1939 (Robinson having in the meantime died intestate and an undischarged bankrupt in 1930), some person or persons unspecified appointed P and Q (two apparently unconnected people) to be trustees of the property for the purposes of the statutory trusts in place of the Public Trustee. Even assuming that the land ever vested in the Public Trustee, it would be interesting to know whether this last appointment was valid and who made it. It seems that it satisfied a purchaser, as we next find P and Q selling the farm under their statutory trust for sale for about £2,000, or £1,000 less than the mortgagees' charge. The case was brought to determine the destination of the £2,000. It was claimed by the trustee in bankruptcy of Robinson, on the ground that the rights of the mortgagees were statute-barred. The mortgagees claimed that in view of *Re Landi* they could not be barred once the statutory trusts were imposed in 1926. Now, I have very little doubt, on the reported facts, that the statutory trusts were never imposed at all, since the land was not held in undivided shares on the first day of 1926, but by Robinson's trustee in bankruptcy absolutely (subject to the mortgage), the tenancy in common having come to an end at the death of the third sister in 1923. On this basis, the mortgagees were clearly barred, and the money should have gone to the trustee in bankruptcy (incidentally, the purchaser from P and Q would not have got a good title, as P and Q would have claimed as trustees of a non-existent statutory trust).

Be that as it may, all the learned counsel engaged in the case argued on the footing that there *was* a statutory trust, and, accepting this premise, we get an interesting point of law. The Public Trustee, and, later, P and Q, were statutory trustees. In *Re Landi* it had been held that a statutory trustee cannot, as against his co-tenant in common of the proceeds of sale, acquire a beneficial title by lapse of time. Does that principle apply here? Farwell, J., held that it did. He relied on *Re Landi*, although it is a very different thing to say that a trustee cannot acquire a statutory title against his *cestui que trust* from saying that a mortgagor of an equitable interest cannot acquire title, as against his mortgagees, to money in the hands of a third party as trustee. The same considerations do not apply at all. The learned judge also relied on L.P.A., s. 35, which says that statutory trustees are to hold the proceeds on trust to give effect out of them to the interests of all persons, *including incumbrancers*, interested in the land. On the face of it, to rely on this provision seems to beg the question whether the mortgagees of 1921 *were* still incumbrancers in 1939, or whether their title was barred in 1933, so that they ceased to be incumbrancers. I think, however, that (if two conditions were fulfilled) the case was correctly decided. If there was a statutory trust, and if the trustee in bankruptcy had received the rents since 1923 to the exclusion of the mortgagees, the trustees were, in effect, paying the wrong beneficiary. But it has been held that to do so does not give the wrong beneficiary a title to the equitable interest against the right beneficiary (see *Knight* v. *Bowyer* (1858), 2 De G. & J. 421). This defence of the decision assumes that the mortgagor or those claiming under him had been receiving the rents: this fact we are not told in the report.

Even so, the case is a puzzling one. I should add that it was decided under the old law of limitation, and is therefore no certain guide to the position under the Limitation Act, 1939. In s. 7 of that Act there are some novel and peculiar rules about trusts and trusts for sale of land, whose full effect will not be understood until they have been the subject of a good many reported cases.

Landlord and Tenant Notebook.

War Damage to Roof of Flats.

For a long time the law relating to the liability of a landlord of a building divided into flats for the condition of the roof—assuming it to be retained by him—remained unsettled. Successive decisions modified the correct answers for the time being to such questions as whether he had any responsibility at all, what would make him responsible, and to whom. The answer to the last depended essentially on whether proceedings could be successfully brought in tort as well as or instead of for breach of implied contract; and now, apart from the position of tenants' families and other occupiers who are not parties to the tenancy, the point may prove of the utmost importance when the roof suffers "war damage" sufficient to affect the amenities of flats, but not sufficient to entitle tenants to disclaim under the Landlord and Tenant (War Damage) Act, 1939, s. 4.

Briefly, the history is as follows: in *Carstairs* v. *Taylor* (1871), 40 L.J. Ex. 129, the plaintiffs' ground floor premises, which they held of the defendant who occupied the upper part, were damaged by rainwater which escaped from a box into which it was collected from the roof, the immediate cause being a hole made by a rat; and the action was dismissed. The important features for present purposes are that Bramwell and Martin, BB., said that there was a duty to take reasonable care, which had, however, not been broken. The judgments negatived, or did not encourage, the suggestion of implied covenant, but neither was anything said about the position of third parties.

Then in *Hargroves, Aronson & Co.* v. *Hartopp* [1905] 1 K.B. 472, landlords were held liable to their tenants for damage by rainwater due to the stoppage of a gutter, the stoppage having been notified to the landlords five days before they did anything about it. The tenants sued for breach of implied contract (citing a covenant for quiet enjoyment), and also for negligence. The landlords were held liable for breach of duty to take care, Lord Alverstone, C.J., relying both on the above-mentioned *dicta* and on *Miller* v. *Hancock* [1893] 2 Q.B. 177 (C.A.)—of which more later.

Next came *Hart* v. *Rogers* [1916] 1 K.B. 646, an action for the rent of a flat; the defendant counter-claiming for damage to the hall and bathroom occasioned by water from the roof, which had been cracked by frost. Scrutton, J., found that the plaintiff had not been negligent, but held, on the authority of *Miller* v. *Hancock*, that the landlord's liability was absolute.

Before the next case, *Miller* v. *Hancock* was overruled by *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74, which limited the duty of a landlord towards third party invitees to an obligation not to expose to concealed danger.

In *Cockburn* v. *Smith* [1924] 2 K.B. 119 (C.A.), the parties to the appeal were tenant and landlord, and the appellant plaintiff was able to show that she had complained about the gutter leaking to the defendant's agent (who was not called as a witness) by telephoning to his clerk, and later in writing, but nothing had been done, and she and her daughter had contracted rheumatism. At first instance, judgment was given for the defendant, but on appeal it was held that he had broken "some" duty and was liable. Scrutton, L.J., who had tried *Hart* v. *Rogers* as Scrutton, J., pointed out that, apart from an explanation of *Miller* v. *Hancock* which had not been mentioned to him at that time, the latter had since been overruled.

It is of interest to note that the fact that the daughter took no part in the appeal enabled the court to reverse the decision without definitely deciding whether the duty arose out of an implied promise or not.

What was said on the point is as follows. Bankes, L.J.: "It cannot now be suggested that there was any agreement, express or implied, which can accurately be described as an agreement to repair the roof." The learned lord justice later referred to *Hargroves, Aronson & Co.* v. *Hartopp*, *supra*, and said: "Whether this duty [to remove an obstruction after notice] arises out of a contract between the parties, or whether it is an instance of the duty imposed by law upon an occupier of premises to take care that the condition of his premises does not cause damage, I prefer not to decide. Lord Buckmaster in *Fairman's Case* speaks of it as a contractual obligation . . . There is much to be said for that view, but it is an immaterial question." Scrutton, L.J., said: "In my opinion there is enough here to impose a liability upon the respondents at common law . . . In my view his [the landlord's] duty may be based upon that modified doctrine of *Rylands* v. *Fletcher*, which is applicable where he retains in his control an artificial construction which becomes a source of danger to his tenant. I reserve the question whether there is also a contractual liability arising out of the relation of landlord and tenant." And Sargant, L.J.: "It is not quite clear whether the landlord's duty is founded on some implied covenant or obligation in the contract of tenancy or from the circumstances that the landlord retains physical possession of the roof and lets the flat to the tenant. In my view it is not necessary to decide that difficult question."

If *Cockburn* v. *Smith* were the latest case and last word on the subject, it would be difficult to advise not only tenants' families but tenants themselves when vibration due to gunfire, or shell splinters or bomb splinters or blast, cause leaks in or other disrepair to roofs with subsequent injury to property and health. For the Landlord and Tenant (War Damage) Act, 1939, s. 1, relieving against liability for war damage, is

pretty comprehensive; but it does limit itself to obligations imposed on any persons to do any repairs in relation to land comprised in a disposition by virtue of the provisions, whether express or implied, of that disposition. A disposition means any instrument, including an enactment or oral transaction creating or transferring any interest in land. A flat would be land (which includes buildings) comprised in a disposition, and an implied duty to repair the roof may be an obligation to do repairs " in relation to " the flat; so the tenant, and, of course, his family, would, in order to succeed, have to claim in tort.

That he and his family can claim in tort was decided by *Cunard and Wife* v. *Antifyre, Ltd.* [1933] 1 K.B. 551. The defendants in that case let the top three floors of a large building to M, who, in breach of covenant, let part of the third floor to the male plaintiff. Some guttering fell from the roof, which was retained by the defendants, and crashed through the glass roof of the plaintiff's kitchen, injuring the female plaintiff. It was found and held that the accident was due to negligence, the guttering never having been properly supported, its defective condition being and having been obvious to any one who looked at it, and decay of the screws attaching it to a fascia having caused it to leak. The county court judge reluctantly decided against both plaintiffs. Allowing the appeal, Talbot, J., discussed the principles of the law of negligence with some thoroughness, referring in particular to Lord Macmillan's speech in *Donoghue* v. *Stevenson* [1932] 2 A.C. 562: " The law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards." (I might recall here that at the commencement of his judgment in *Cockburn* v. *Smith, supra*, Scrutton, L.J., made a general reference to the difficult questions concerning responsibility which had been raised by the habit of living in flats.) Talbot, J., quoted further from Lord Atkin's speech: " You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation when I am directing my mind to the acts or omissions which are called in question," and on these lines the learned judge came to the conclusion that the occupier of and any person lawfully in the kitchen being reasonably in contemplation as closely and directly affected by the omission to repair, the defendants were liable.

The above decision has, I know, been criticised, but while it stands it would appear that the Landlord and Tenant (War Damage) Act, 1939, affords no answer to a claim by tenants and occupiers of flats injured, in consequence to war damage to the roof, undemised after the landlord has had notice of the damage and time to repair it.

Our County Court Letter.

Exchange of Horses.

In *Parsons* v. *Butler*, recently heard at Calne County Court, the claim was for £5 as damages for fraudulent misrepresentation, and the counter-claim was for £5 as the price of a horse. The plaintiff's case was that on the 13th July, 1939, he bought from the defendant a black horse, for which he (the plaintiff) gave a cheque for £2 10s. and a chestnut horse. The black horse had been warranted a sound worker and fit for haymaking, but it soon went lame in the off front leg. Payment of the cheque was therefore stopped, whereupon the defendant offered to take the black horse back and to give to the plaintiff £2 12s., the sum for which the chestnut horse had been sold. As the latter amount did not represent the value of the chestnut horse, the plaintiff did not agree to cancel the previous agreement, for the breach of which he had suffered the damage claimed. The case for the defendant was that the original agreement had been cancelled, that he had accordingly paid the plaintiff the sum of £2, but that the black horse was not returned to the defendant. The plaintiff had therefore been summoned for larceny as a bailee, but the magistrate dismissed the case. His Honour Judge Kirkhouse Jenkins, K.C., dismissed the claim and counter-claim, with costs.

The Quality of Potatoes.

In a recent case at Huntingdon County Court (*Finch* v. *Presland*) the claim was for £25 4s. as the price of two tons of seed potatoes. The original agreement was for the delivery of Scotch seed potatoes in October and November, 1939, but it was only possible to obtain Irish seed potatoes. The latter were accepted by the defendant, and were delivered at his farm. No complaints were made by the defendant until February, when the plaintiff was asked to go and see the potatoes. Having had no other complaints, the plaintiff saw no occasion to inspect the potatoes and did not do so. The potatoes had been stored, before delivery, in a shed and had been covered with straw and sheets. They were examined and accepted by the defendant on delivery, but were left uncovered in spite of the snow and frost. Two other purchasers of Irish seed potators from the plaintiff stated that they had not frozen and were yielding a good crop. The defendant's case was that he was not consulted about the order being changed from Scotch to Irish seed. The latter were not in accordance with the order, and, on delivery, the sacks were not opened owing to the severe weather. Apparently the potatoes were already frozen on arrival, as they were immediately covered with about a ton of straw, and were dumped near two hay stacks. On being inspected by the defendant, at the first opportunity, the potatoes were found to be frozen. His Honour Deputy Judge Grafton Pryor gave judgment for the plaintiff, with costs, payment to be made, by consent, after the August harvest.

Division of Estate of Intestate.

In a recent case at Hereford County Court (*In re Lowe, deceased*) the claim was for a declaration that £300, given by the deceased in 1923 to the respondent (one of his sons) was subject to a trust in favour of the other three children of the deceased. The case for the applicants was that, after the death of the deceased, the respondent had produced a so-called will, under which the other three children only received £53 each. The balance of the amount was stated to have been used for expenses. The respondent's case was that the £300 was a gift to himself, in consideration of his having undertaken the care of his father in his declining years. The money had been used to support the father and, on his death, the balance remaining was £164. The cost of a gravestone was £5, and the remaining £159 was proposed to be divided equally among the three applicants. The share of each was therefore £53, and nothing had ever been said by their father to the effect that they would receive £100 each. In fact the applicant was himself £100 out of pocket under the proposed distribution. His Honour Judge Roope Reeve, K.C., observed that he accepted the respondent's evidence as to the gift. This was immaterial, however, as it had transpired that the proposed distribution coincided with the applicant's claim. The bankbooks corroborated the figures, and it was unfortunate that the gist of the respondent's evidence in court had not been previously communicated to the applicants. Although the claim failed, the applicants would have no grievance. Judgment was given for the respondent, with costs.

Tithe Redemption Annuities.

In *Tithe Redemption Commission* v. *West*, recently heard at Bromyard County Court, the claim was for £2 in respect of two years' tithe. The applicants' case was that the documents produced by them showed that the respondent's land was formerly subject to a tithe rent-charge of £1 1s. 9d. The respondent's case was that she purchased the property in 1929, and no documentary evidence of its liability to tithe had since been produced. It was true that, on the purchase of the land, the vendor's solicitor had paid one year's tithe. Apart from that occasion, no tithe had been paid for thirty-five years. The title deeds had been destroyed by fire in 1890, but, if documentary evidence could be produced of previous payments, the respondent would have paid the amount demanded. His Honour Judge Roope Reeve, K.C., dismissed the application, with costs.

The Remuneration of Solicitors.

In a recent case at Bletchley County Court (*Walton and Ray* v. *Hollis*) the claim was for £9 2s. 6d. for professional services. The plaintiffs' case was that they had been instructed by the defendant to defend his son and another young man in a case at Buckingham Quarter Sessions. The defendant was informed that the approximate cost would be £10, including counsel's fee, and £2 was paid on account by the defendant. Liability was denied on the ground that the defendant had merely gone to the plaintiffs' office to show the young men the way, and had given no instructions for their defence. The £2 had been subscribed by the young men clubbing together, and nothing had been said about briefing counsel. His Honour Judge Hurst gave judgment for the plaintiffs for the amount claimed, with costs, payable at 15s. a month.

Practice Notes.

Writ of Attachment.

IN *Benabo* v. *William Jay & Partners, Ltd.* (1940), 57 T.L.R. 65, B moved to issue writs of attachment against J and H, directors of the company. In February, 1940, the applicants had asked for an account of rents and profits received and payments made by the company as agent for the applicants. In July, the court ordered that the company should, within four days after service of the order, lodge £118 in court, the sum shown to be in its hands. In August, copies of the order were *served upon the directors* at the registered offices. The orders were endorsed with a statement that if *the directors* neglected to obey the order by the specified time, they would be liable to the process of execution to compel them to obey the order. The order was not obeyed, and the applicants served notice of motion for leave to issue writs of attachment against the directors for the contempt of the company. The directors, in their affidavit, explained their personal position.

By Ord. XLI, r. 5, a judgment or order requiring any person to do any act, must state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order served must be endorsed a memorandum to the effect that if the named person neglect to obey the judgment or order within the specified time, he will be liable to execution for the purpose of compelling him to obey. Order XLII, r. 31, states that a judgment or order against a corporation wilfully disobeyed may, by leave, be enforced by sequestration either against the corporate property, or by attachment against the directors, or by writ of sequestration against their property. The remedy is in the discretion of the court.

Morton, J., held that under the Companies Act, 1929, s. 370 (1), the document was properly served, being left at the registered office of the company. But the copies of the order were not endorsed as Ord. XLI, r. 5, required; the memorandum should have referred not to the directors, but to the company. The remedy against a director by attachment is an alternative remedy which cannot be pursued unless the applicants can proceed against the company, which they cannot do because the copies of the order were not properly endorsed (see *per* Luxmoore, J., in *Iberian Trust Case* [1932] 2 K.B. 87.) If the memorandum had been in proper form and the order had then been wilfully disobeyed, the plaintiffs could have proceeded under Ord. XLII, r. 31, viz.: alternatively by sequestration of the corporate property, or by attachment against the directors. Since the present endorsement was defective, neither of these remedies was, in the present case, available.

The point, said Morton, J. (at p. 66 of 57 T.L.R.), was not "wholly technical." Was the company *wilfully disobedient* and had it *funds* to discharge the debt? The directors had explained their personal position, but not the position of the company, beyond stating that the company held a lease of the business premises. This was a "direct result" of the memorandum being "incorrectly framed."

"In an application for leave to issue a writ of attachment there must be strict compliance with the rules."

Management of Property : Application.

AN application for the payment out of court to the receiver of partnership property is "connected with the management of property," and may be made *by summons* under Ord. LV, r. 2 (13) (*Lee* v. *Lee* (1940), 57 T.L.R. 6).

A sum of £1,005 was certified as due to him by the Master on passing his accounts. A summons was taken out for directions for the payment out of the sum and it was objected that, the sum exceeding £1,000, there was no power to order payment on an application by summons.

By Ord. LV, r. 2 (13) "Applications connected with the management of property" are among the matters to be disposed of by Chancery Masters. An application for payment out of a balance which had arisen upon the dissolution of partnership, was, *prima facie*, one would have thought, said Morton, J., an application connected with the management of property.

In *Re Terry* [1929] 2 Ch. 412, 415, Clauson, J., said that "the primary practice" is to order funds to be paid out of court only upon the hearing of an action, or *on petition*, unless the rules authorise an order to be made otherwise. In his view, the sub-rule (13) gives the Judge in Chambers "full jurisdiction to do whatever is proper, within the bounds of the court's powers, to carry out and effectuate the order which he proposes to make . . . he has authority . . . to make an order that the money shall be so applied, which will, of course, involve an order that the money be paid out of court."

Although in *Lee* v. *Lee*, *supra*, there had been no sanction by the judge of future expenditure, the two cases were analogous and the same principles applied.

To-day and Yesterday.

Legal Calendar.

25 November.—On the 25th November, 1897, Bigham, Darling and Channell, JJ., were knighted. There was a political aspect to the occasion which inspired some satirical verses beginning—

"Three judges went riding to Windsor town
To visit the Queen and be knighted;
For unless this is done by the hand of the Crown
No judge can be really delighted.
But three all at once is a rarity quite
In these days of political people;
And it's said that they all lost their way in the night
Quite misled by a turreted steeple."

There followed several gibes about the Exchange Division, Deptford and paving "all the Rhodes to the Afric Committee."

26 November.—Private Thomas Tole of the Royal Fusiliers was tried by court martial at Chatham on the 26th November, 1858, on the charge of deserting to the Russians from the army before Sebastopol three years before during the Crimean War. He had been sent out on fatigue duty to cut fuel and had not returned, and his story was that he had been taken prisoner by two enemy officers and made to help to carry a wounded man into the town. Evidence of other English soldiers who had been captured put the matter in another light, and there was reason to believe that information given by him had led to a general attack on our lines. He was sentenced to penal servitude for life.

27 November.—Francis Pemberton was called to the Bar at the Inner Temple on the 27th November, 1654, at the age of twenty-nine. He seems to have made rather a wild beginning in the world and to have run into debt to such an extent as to be imprisoned for it. This apparently had a sobering effect and made him apply himself to the study of the law with such energy that he became one of the ablest men in his profession. When he was a distinguished leader his forensic duties brought him another taste of prison, for having been appointed by the House of Lords to plead a case before them in which a member of the Lower House was defendant, the Commons, in the course of a squabble over the privileges of their members, committed him to the Tower. He became Chief Justice in 1681. After the Revolution of 1688 he was again imprisoned for a time on account of a judgment he had delivered six years before.

28 November.—For a criminal's adventures to be presented on the stage within twelve days of his execution must be unique. It happened when on the 28th November, 1724, there was presented at Drury Lane an entertainment entitled "Harlequin Sheppard" featuring, as they would now say, the great escape from Newgate effected by Jack Sheppard, but lately sent to his account. The first six scenes were laid in the prison and showed the incidents of the exploit. There were songs something in the style later adopted in "The Beggar's Opera," but the piece was poor and did less than justice to its hero's character. It was "dismissed with a universal hiss."

29 November.—In 1667 Lord Clarendon fell, his enemies triumphed, and he lost the Chancellorship. Evelyn records a visit to him on the 29th November: "I found him in his garden at his new built palace, sitting in his gout wheel-chair and seeing the gates setting up towards the north and the fields. He looked and spoke very disconsolately. After some while deploring his condition to me, I took my leave. Next morning I heard he was gone." He had fled to France that very evening.

30 November.—On the 30th November, 1859. Sarah Wiggins was tried at the Old Bailey for murder. She had lived with a man called White, who had deserted her and his children, including one by a previous marriage. This little Jemmy, who was not yet four years old, irritated her one night by some fault and she tied him horizontally to the foot of her bed, leaving him there all night. Next morning he died. She was convicted of manslaughter and sentenced to ten years' penal servitude.

1 December.—Father Edmund Campion was executed at Tyburn on the 1st December, 1581, aged forty-two.

THE WEEK'S PERSONALITY.

Since Sir Thomas More was killed none of the politico-religious executions of sixteenth century England had shocked the conscience of Europe so deeply as that of Father Edmund Campion, whom history still ranks with the great Elizabethans. After a brilliant career at Oxford, in the course of which he was selected to make an oration before Queen Elizabeth,

a splendid career seemed to lie before him, and he was in fact ordained deacon in the Church of England. But his conscience turned him to the Roman Catholic faith; he gave up everything and went abroad, becoming a Jesuit priest. His learning and piety met with the highest recognition in Rome, in Vienna and in Prague, but he was drawn back to his native land, whither he gallantly returned to attempt its conversion. Preaching and ministering in secret, he led a hunted life, but his influence grew so great that when he was captured by the authorities nothing was spared to make him change his faith. Torture by the rack and the Queen's offer of life, wealth and dignity could not shake him. Eventually he was tried on a charge of treason and found guilty with several others. He said: "If our religion do make traitors we are worthy to be condemned, but otherwise are and have been true subjects as ever the Queen had." At the scaffold he remained firm and clear-minded and prayed for the Queen. When asked whether for Elizabeth the Queen, he answered: "Yea, for Elizabeth, your Queen and my Queen." His loyalty was certain, his life pure and devoted and his learning of the highest.

MATRIMONIAL IGNORANCE.

A man recently tried for bigamy at the Leeds Assizes was found "guilty with a certain amount of ignorance," and sentenced to eight days' imprisonment, which meant immediate release. There seems to have been a burlesque touch about one of his marriage ceremonies for, owing to a confusion of grouping, the clergyman asked the bride's father if he would take the girl and afterwards put the ring on her wrong hand. Despite its pivotal function in the lives of most citizens, marriage remains the subject of popular ignorance almost untouched by our educational system. Mr. Arthur May came across it constantly as Surrogate in Doctors' Commons, and told something of it in a delightful book. I very much like his tale of the man who applied for "one of your three months' licences." When told that they were all available for three months, he persisted: "But what I mean to say is, I want one of those things which only marry you for three months and you renew it afterwards if you wish to and if you don't like the lady you don't." Another error in the same style was provided by a Scot who wanted to recover the money he had paid for his licence because the marriage had turned out a disappointment. No doubt this war, like the last, is producing letters like the following authentic specimen: "Dear Sir, I am writing to ask you if you would kindly forward a marriage licence for a soldier in khaki. Ten shillings postal order enclosed. Yours truly." Finally, there was the man who wrote briefly to Doctors' Commons: "I wish to divorce my wife and I understand you will make the necessary arrangements with the King's Proctor."

ANOTHER MISCONCEPTION.

High rank is not always better informed. "Guilty with a certain amount of ignorance" is a paraphrase of the Duke of Newcastle's "guilty erroneously but not intentionally" when he joined the other peers in convicting the reputed Duchess of Kingston, actually Countess of Bristol, of bigamy. She had imagined that she could take a bye-road out of matrimony by way of a collusive jactitation suit in the ecclesiastical courts forbidding her unwanted husband to allege that she was his wife. The Attorney-General pointed out that if she were right "a man between twenty-eight and thirty-five might, with good industry, marry seventy-five wives by sentences of the Ecclesiastical Courts."

Obituary.

MR. T. A. HERBERT, K.C.

Mr. Thomas Arnold Herbert, K.C., died on Friday, 22nd November, at the age of seventy-eight. Mr. Herbert was called to the Bar by the Inner Temple in 1889, and took silk in 1913.

MR. W. L. M. BENSON.

Mr. William Lockwood Maydwell Benson, late of Messrs. Withers & Co., solicitors, of Arundel Street, Strand, W.C.2, died on Friday, 22nd November, at the age of seventy-five. Mr. Benson was admitted a solicitor in 1895.

MR. A. B. B. WILSON.

Mr. Archibald Berdmore Buchanan Wilson, solicitor, and senior partner in the firm of Messrs. Dawson & Co., solicitors, of New Square, Lincoln's Inn, W.C.2, died on Monday, 25th November, at the age of seventy-two. Mr. Wilson was admitted a solicitor in 1896.

Notes of Cases.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

O. RM. O.M. SP. (a Firm) *v.* Nagappa Chettiar and Another.

Viscount Maugham, Lord Russell of Killowen, Lord Wright, Sir George Rankin and Mr. M. R. Jayakar. 17th September, 1940.

Limitation (India)—Action based on fraud, misconduct or mistake—Time runs from date of plaintiff's knowledge—Indian Limitation Act (IX of 1908), Sched. I, arts. 36, 120.

Appeal from a decree of the High Court, Madras, in its appellate jurisdiction.

An agreement for the partition of family property provided, *inter alia*, that the plaintiff's uncle should take over the family business and that the two branches of the family should each furnish a sum for certain charities. The plaintiff accordingly gave his uncle cheques for the sums which he had agreed to find. The cheques were drawn on the plaintiff's account with the defendants, a firm of bankers, who credited them in each case to an account in the name of the charity concerned. The sums remained to the credit of the accounts of the charities until the 10th February, 1920, on which date they were transferred to the uncle's account with the defendants, and the two accounts of the charities were closed, the result of the transaction being that the uncle's overdraft with the defendants was cancelled. The plaintiff accordingly brought this action to compel the defendants to refund to the charities the sums so received by them. The trial judge dismissed the action. That decision was reversed on appeal and the defendants now appealed to His Majesty. (*Cur. adv. vult.*)

Sir GEORGE RANKIN, delivering the judgment of the Board and having reviewed the facts, said that the disappearance of the trust funds into the uncle's account would not among ordinary business men be deemed an "investment" of the money, and the defendant bank had not succeeded in showing that the uncle had in February, 1920, acted within any authority given to him when the trust moneys were handed to him. As to the question of limitation, in their lordships' opinion it was art. 120 of the First Schedule to the Indian Limitation Act, 1908, and not art. 36, which applied to this case. The claim against the bank did not allege a breach of trust on their part. Article 120 prescribed a period of six years' limitation to run from the time "when the right to sue accrues." The question was whether time began to run from the 10th February, 1920, or from the date in 1929 when the plaintiff came to know that the trust moneys were set off against the uncle's overdraft. The action having been brought in 1933, the plaintiff must establish 1929 as the starting point of the statutory six-year period. It was recognised in *Musammat Bolo* v. *Musammat Koklan* (1930), L.R. 57 I.A. 325, that an infringement of the plaintiff's right, or at least a clear threat to infringe it, was necessary before time began to run under the article. In *M. Basavayya* v. *Majeti Bapana*, A.I.R. (1930), Mad. 173, it was held that in actions founded on allegations of fraud, misconduct or mistake, time began to run from the time when the fraud, misconduct or mistake became known to the plaintiff. Article 120 being an omnibus one, applicable to suits "for which no period of limitation is provided elsewhere in this Schedule," in only some of which suits fraud, misconduct or mistake would be the cause of action, it was held to be in consonance with the scheme of the Act that the right to sue under art. 120 should be deemed to accrue from the time of the plaintiff's knowledge. The Board, although if the matter had been *res integra* they might have decided otherwise, were prepared to apply to the present case the principle established in the Indian decisions, that, in cases to which the rule applied, the plaintiff could not be debarred of his remedy unless with knowledge of his rights he had been guilty of delay. Finally, their lordships did not agree that s. 92 of the Code of Civil Procedure, which required the consent of the Advocate-General, applied to a case like the present, where a trustee sought to recover property in the hands of a stranger to the trust. The appeal must be dismissed.

COUNSEL: *Sir Herbert Cunliffe*, K.C., and *Wallach*; there was no appearance by or for the respondent.

SOLICITORS: *Hy. S. L. Polak & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

HOUSE OF LORDS.

Wolstanton, Ltd. *v.* Newcastle-under-Lyme Corporation. Attorney-General of the Duchy of Lancaster *v.* Same.

Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter.

30th May, 1940.

Mines—Claim of right to let down surface without compensation—Custom—Reasonableness.

Appeal from a decision of the Court of Appeal (83 SOL. J. 639; 55 T.L.R. 965) affirming a decision of Farwell, J.

The plaintiff corporation were owners in fee simple of land formerly of copyhold tenure in the manor of Newcastle-under-Lyme, enfranchised under the Law of Property Act, 1922, and had erected a fire-station on it. The defendant company, who were tenants of the Crown in right of the Duchy of Lancaster, had for some years past been mining

in the vicinity of the plaintiffs' fire-station. The plaintiffs in their action alleged that the defendants' workings had caused subsidence of the surface and damage to their land and buildings, and they claimed a declaration and an injunction. The defendants set up a custom and prescriptive right to work the mines and minerals within the manor on paying to the tenants and occupiers of the surface of any lands damaged thereby reasonable compensation " but without making compensation . . . for the said surface on any other account and without making any compensation . . . for damage occasioned to any messuages, dwelling-houses or other buildings " thereon. They also relied upon the presumption of a lost grant. The plaintiffs contended that no such custom or prescriptive or other right could be sustained or ought to be presumed as it would be unreasonable. Farwell, J., and the Court of Appeal held that the custom pleaded by the defendants was bad in law because unreasonable. The defendants appealed. (*Cur. adv. vult.*)

VISCOUNT MAUGHAM said that the decision in *Hilton* v. *Lord Granville* (1844), 5 Q.B. 701, was based on the ground that, whether the pleas demurred to related to a prescription or a custom, they could not be sustained at law because unreasonable. The question whether the houses were freehold or copyhold was stated not to affect the case. It was now argued that *Hilton's Case* was wrongly decided in a case where the same custom was set up by a tenant of the Crown in relation to the same manor of Newcastle-under-Lyme; but such a decision as to the local law of the lands within a manor ought not to be disturbed after over ninety years without very good reason. The Court of Queen's Bench, in deciding that the custom was unreasonable, had approved and relied on the authority of a case decided nearly a century before, which had been accepted as good law in that House—namely, *Broadbent* v. *Wilks* (1742), Willes 360; affirmed (1745), 2 Str. 1224. Denman, C.J., however, had since been pronounced wrong (see *Dixon* (*Ltd.*) v. *White* (1883), 8 App. Cas. 833, at p. 843) in saying that, if the grant of the ancient houses could be produced reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and void. That erroneous view of the effect of a reservation by a grantor of a right which might involve the destruction of the surface granted did not seriously impair the authority of *Hilton* v. *Lord Granville*, *supra*, on the point of unreasonableness. The case had further been approved in *Marquis of Salisbury* v. *Gladstone* (1861), 9 H.L.C. 692, the only modern case in which the House had considered the question of validity of a custom set up as between the lord of a manor and his copyhold tenants. It was, however, asserted that the authority of *Hilton's Case*, *supra*, was impugned by Lord Hatherley, L.C., in *Duke of Buccleuch* v. *Wakefield* (1870), L.R. 4 H.L. 377, at p. 399. On careful consideration, he (Lord Maugham) came to the conclusion that that case left the authority of *Hilton's Case* where it was. The reservation by a judge or a lord of appeal of the right to reconsider a decision at some later date ought not to be taken as a statement that he thought the decision erroneous. His lordship having discussed the characteristics of certainty and immemorial origin which a custom must have, said, dealing with the third characteristic of reasonableness, that he found it impossible on the authorities to hold that a custom for the lord to get minerals beneath the surface of copyhold or customary freehold lands without making compensation for subsidence and damage to buildings was a reasonable custom. The appeal should be dismissed.

The other noble lords agreed.

COUNSEL: *Roxburgh*, K.C., and *Leonard Stone*, for the appellant company; *Sir Herbert Cunliffe*, K.C., *Romer*, K.C., and *Andrewes Uthwatt*, for the Attorney-General for the Duchy of Lancaster; *Harman*, K.C., and *Wilfrid Hunt*, for the corporation. *Meston* held a watching brief for the Coal Commission.

SOLICITORS: *Hancock & Willis*, for *Ellis & Ellis*, Burslem; *The Solicitor for the Duchy of Lancaster*; *Sharpe, Pritchard & Co.*, for the *Town Clerk*, Newcastle-under-Lyme; *B. S. Jaquet*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL.

Lee and Another *v.* Hays Wharf Proprietors, Ltd.

MacKinnon and Clauson, L.JJ. 11th June, 1940.

Procedure—County court—Proceedings under Employers' Liability Act—Common law action arising out of same facts—Removal of proceedings under Act into High Court—Absolute discretion of judge—County Courts Act, 1934 (*24 & 25 Geo. 5, c. 53*).

Appeal from a decision of Stable, J., in chambers.

The plaintiffs began proceedings in the county court under the Employers' Liability Act, 1880, in connection with the death of one J. E. Lee, and subsequently began an action at common law in the High Court arising out of the same facts. The application to a master for an order to remove the county court proceedings into the High Court, so that they might be heard immediately after the common law action, was granted. The defendants appealed to the judge in chambers, who expressed the view that the order of the master was right, but held that he was bound by the authority of *Munday* v. *Thames Ironworks Co.* (1882), 10 Q.B.D. 59, which laid down, in circumstances identical with those in the present case, that the power of removal ought only to be exercised in exceptional circumstances. He accordingly reversed the order of the master. The plaintiffs appealed.

MACKINNON, L.J., said that, s. 111 of the County Courts Act, 1934, having provided that " the High Court or a judge thereof may order the removal into the High Court . . . of any proceedings commenced in a county court, if the High Court or judge thinks it desirable that the proceedings should be heard and determined in the High Court," it appeared that *Munday* v. *Thames Ironworks Co.*, *supra*, ought not now to be treated as a binding authority which prevented a judge from exercising the absolute discretion as to removal of proceedings which he was now given in such a case as the present, where there were proceedings under the Employers' Liability Act in the county court and a current action at common law in the High Court. It was relevant also to observe that in *Challis* v. *Watson* [1913] 1 K.B. 547, where s. 126 of the Act of 1888 was concerned, it was held that the High Court had an absolute discretion to consider, having regard to all the circumstances, whether it was desirable that the action should be tried in the High Court or remain in the county court. That being so, Stable, J., was not prevented by *Munday's Case*, *supra*, from exercising his discretion in the way in which he had desired to exercise it. The appeal would, therefore, be allowed.

CLAUSON, L.J., agreed.

COUNSEL: *H. H. Harris*; *Monier-Williams*.

SOLICITORS: *J. S. I. Rabin*; *Clifford-Turner & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Middows, Ltd. *v.* Robertson.
W. W. Howard, Brothers and Co., Ltd. *v.* Kann.
Forestal Land, Timber and Railways Co., Ltd. *v.* Rickards.

Hilbery, J. 6th September, 1940.

Scott, MacKinnon and Luxmoore, L.JJ. 25th November, 1940.

Insurance (marine)—British cargoes in German ships before war—Loss through scuttling on reaching enemy port—Whether insurers liable.

Test actions on marine insurance policies.

The plaintiffs were British owners of cargoes which were on board three German ships at the outbreak of war. The defendants were representative Lloyd's underwriters with whom the plaintiffs were insured. The contracts of affreightment were made and the goods shipped before the war began. The German Government took control of all German shipping from the 15th August, 1939. The captains of the three vessels in which the plaintiffs' cargoes were being carried were ordered to make their way if possible to a German port, and to scuttle their vessels if that should be necessary in order to avoid capture. Two of the ships were scuttled, while the third succeeded in reaching Hamburg. In each case the plaintiffs lost their cargoes, and brought an action to recover their loss under their policy. (*Cur. adv. vult.*)

HILBERY, J., said that on the facts there was a loss by restraint of princes within the meaning of the policy. Dealing with the scuttling cases, he said that the defendants contended that the abandonment of the contract voyage by the master constituted a frustration of the adventure. A marine policy was not a mere insurance of goods; it was an insurance of the goods for the particular voyage, and the conduct of the master, in his (his lordship's) opinion, constituted a frustration of the adventure caused by a restraint of princes; and where a loss might be attributable to more than one cause and the policy was warranted free from any one of those causes, the claim must fail. The claim for a constructive total loss failed. As to an actual total loss by scuttling, the vessels in trying to run the blockade were engaged in a warlike operation, and there could be no doubt that that operation was the proximate cause of the loss. The underwriters could not, however, be liable unless the loss occurred on a voyage covered by the policy. It was conceded that no reliance could be placed on the provision for variation of voyage in the bill of lading, for that contract became illegal on the outbreak of war, and no claim could be supported under s. 45 of the Marine Insurance Act because the change of voyage there contemplated was a change made by free will of the parties. When these vessels set sail under the orders of the German Government they were not on commercial voyages at all, but on voyages in which neither shipowners nor cargo-owners had any interest. There was no risk insured by the underwriters at the time of the scuttling. The claim for actual total loss therefore also failed. The plaintiffs appealed. (*Cur. adv. vult.*)

SCOTT, L.J., said that the dominant fact in each case was that the master of each ship received, at least a fortnight before the outbreak of war, orders from the German Government in furtherance of German war policy to take refuge with his ship in a neutral port, and, if possible, to return to Germany with his cargo. As a last resort he was to scuttle his vessel. In each case the master acted in strict obedience to the orders of his government. The departure from the direct route of the bill of lading voyage was in each case made to take the British-owned cargo as well as the German-owned ship to a port of refuge, and the stay in that port was in pursuance of the plan of the German Government. The departure of the ship from that port was equally the act of the German Government through its agent, the master of the ship, as were also the acts of scuttling or of taking ship and cargo to Hamburg. In each case, when the ship was diverted from its normal contractual course towards the port of refuge, the German Government, through the master, received the actual possession of the cargo, and thereafter retained it; and, when the ship left the neutral port, in an attempt to

reach Germany with the cargo, the German Government was guilty of "converting" the goods. When the cargoes were thus lost to the plaintiffs the loss was one to which were attached the requisite attributes of a constructive total loss as laid down in s. 60 of the Marine Insurance Act, 1906, provided that the loss were proximately caused by a peril within the policy. If it were so caused, it was one in respect of which the insured were entitled to recover wholly apart from any considerations of the loss of the voyage. On the construction of the policies the losses were caused by perils within them. The argument that there could only be a constructive total loss of the cargo where there was a loss of the venture was untenable. The "frustration free" clause only applied to protect the underwriters against a claim which was, in fact, and could only be, based on the loss of the insured voyage. It did not, therefore, avail the defendants, in the present cases, and the plaintiffs were entitled to recover.

COUNSEL: *Sir Robert Aske*, K.C., and *Cyril Miller*; *Willink*, K.C., (on appeal, *Pilcher*, K.C.) and *A. J. Hodgson*.

SOLICITORS: *W. A. Crump & Son*; *Slaughter & May*; *Ince, Roscoe, Wilson & Glover*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

APPEALS FROM COUNTY COURTS.

Riley *v.* Wearmouth Coal Co., Ltd.

The Master of the Rolls, Clauson and Goddard, L.JJ.
31st October, 1940.

Workmen's compensation—Act resulting in death—Arising out of and in course of employment—Breach of regulation—Act for purposes of employer's business—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1 (2).

Appeal from an award under the Workmen's Compensation Act, 1925, by Judge Richardson at Sunderland County Court, dated 18th June, 1940, whereby the applicant, widow of a deceased workman, was awarded £300 in respect of an act resulting in the death of her husband, which she alleged arose out of and in the course of his employment. Section 1 (2) of the Act provides that an act resulting in the death of a workman shall be deemed to arise out of and in the course of his employment, "notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulations applicable to his employment or of any orders given by or on behalf of his employer . . . if such act was done by the workman for the purposes of and in connection with his employers' trade and business." The deceased workman had broken a regulation and acted dangerously in riding on the limber of the leading tub of a set of tubs of coal. It was part of his duty to help boys in charge of tubs in case of difficulty, and he acted in this case in order to help a boy who was in difficulties with a restive pony. He died as a result of injuries received while acting in this way. He had to go "outbye" (in the direction of the shaft away from the coal face) at the end of his shift, and that was the direction in which the tubs were moving.

GREENE, M.R., said that the county court judge had found no difficulty except for *Seviour* v. *Somerset Collieries, Ltd.*, 162 L.T. Rep. 403. In that case the Court of Appeal held that a workman who improperly rode a full tub and was seriously injured in an accident was entitled to compensation, as he was acting in the course of his employment in getting from one point in the colliery to another although adopting an improper and dangerous method of doing so. The county court judge found that the deceased workman was properly going outbye, though in an improper way, and in his lordship's view that brought the case within *Seviour* v. *Somerset Collieries, Ltd.*, *supra*. The county court judge did not consider whether he was carrying out one of his duties in moving the pony. His action in taking charge of a restive pony was within the scope of his employment, but he did it in a wrong way by getting on the limber and driving instead of getting hold of the pony. The appeal was dismissed with costs.

COUNSEL: *Sellers*, K.C.; *C. B. Fenwick*; *Paull*, K.C.; *W. Sexton*.

SOLICITORS: *Gregory, Rowcliffe & Co.*, for *Cooper & Jackson*, Newcastle-upon-Tyne; *T. O. Jones & Co.*, for *K. W. Williams*, Durham.

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

HIGH COURT—CHANCERY DIVISION.

In re Mackenzie; Mackenzie *v.* Mackenzie.

Morton, J. 6th November, 1940.

Administration—Lunatic in England—Land in New South Wales sold under order of the court—Proceeds remitted to England—Lunatic dies in England—Devolution of proceeds of sale—"Real estate"—Meaning—Lunacy Act, 1890 (53 *Vict.*, *c.* 5), *s.* 123 (1)—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 51 (2); *s.* 55 (1) (xix).

In 1885 M, who was then in England, became of unsound mind. She remained in this country and never recovered before her death intestate in 1939. Her domicile was Australian. In 1924 certain lands belonging to her in New South Wales were sold pursuant to an order of the court and the proceeds remitted to this country and lodged in court. At her death these proceeds of sale were represented by the sum of £16,451 17s. 9d., 3½ per cent. War Stock. This summons was taken out by her administrator to have it determined how this fund devolved having regard to s. 51 (2) of the Administration of Estates Act, 1925. The Lunacy Act, 1890, s. 123 (1) provides: "The lunatic, his heirs, executors, administrators, . . . shall have the same interets in any moneys arising from any sale, . . . under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property and subject of the sale, . . . if no sale, . . . had been made, and the surplus moneys shall be of the same nature as the property sold . . ." The Administration of Estates Act, 1925, s. 51 (2) provides: "The foregoing provisions of this part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land and that law shall, notwithstanding any repeal, apply to the case . . ." Section 55 (1) (xix) provides: "'Real Estate' save as provided in Part IV of this Act means real estate, including chattels real, which by virtue of Part I of this Act devolves on the personal representative of a deceased person."

MORTON, J., said that, having regard to the provisions of s. 123 of the Lunacy Act, 1890, the position remained the same as if the land had never been sold. The fund devolved upon the persons who would be entitled to the intestate's land under the law of New South Wales. Section 51 (2) of the Administration of Estates Act, 1925, had no application. Having regard to the definition of "real estate" in s. 55 (1) (xix) this fund was not real estate within s. 51 (2). Further, in his lordship's view, s. 51 (2) had no application to land situate out of the country.

COUNSEL: *L. M. Jopling* (for *R. O. Wilberforce*, on war service); *J. V. Nesbitt*; *J. Pennycuick*: *Wilfrid Hunt*.

SOLICITORS: *Leman, Chapman & Harrison*; *Pritchard, Englefield and Co.*, for *Boote, Edgar & Co.*, Manchester; *Francis & Crookenden*; *Gregory, Rowcliffe & Co.*, for *Wright, Hassall & Co.*, Leamington.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re Mackenzie; Mackenzie *v.* Attorney-General.

Morton, J. 7th November, 1940.

Estate duty—Lunatic domiciled in Australia—Resides in England for fifty-four years prior to death—Proceeds of sale of land in Australia remitted to England—Whether proceeds subject to duty—"Ordinarily resident"—Meaning—Lunacy Act, 1890 (53 *Vict.*, *c.* 5), *s.* 123 (1)—*Finance Act*, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 2 (2)—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 47.

M was domiciled in Australia. In 1885 she came to England and was in that year certified to be of unsound mind. In 1924 the court authorised her receiver to concur in selling her real estate in New South Wales and the proceeds were remitted to this country where they were lodged in court and invested. M died in 1939 intestate without having recovered. The Crown claimed estate duty on the proceeds of the realty then in court. Her administrator took out this summons, to which the Attorney-General was the defendant, asking whether upon the true construction of s. 123 of the Lunacy Act, 1890, and s. 2 of the Finance Act, 1894, the fund representing the proceeds of sale of the real estate in New South Wales, sold pursuant to an order made under s. 120 of the Lunacy Act, 1890, was situate out of the United Kingdom for the purposes of liability to estate duty; and whether, in the events which had happened, the person of unsound mind was "ordinarily resident" in the United Kingdom for the purposes of s. 47 of the Finance (No. 2) Act, 1915.

MORTON, J., said that the question turned on the construction of s. 123 of the Lunacy Act, 1890. In the present case the principles stated in *Attorney-General* v. *Marquis of Ailesbury* (1887), 12 A.C. 672, at p. 687, did not enable him to give a notional situation in New South Wales to the fund in court. In all the circumstances, he must come to the conclusion that the lunatic was "ordinarily resident" in England within s. 47 of the Finance (No. 2) Act, 1915 (*Inland Revenue Commissioners* v. *Lysaght* [1928] A.C. 234; *In re Erskine* (1893), 10 T.L.R. 32).

COUNSEL: *W. P. Spens*, K.C., and *L. M. Jopling* (for *R. O. Wilberforce*, on war service); *J. H. Stamp*.

SOLICITORS: *Leman, Chapman & Harrison*; *Solicitor of Inland Revenue*.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

HIGH COURT—KING'S BENCH DIVISION.

Merchants & Manufacturers Insurance Co., Ltd. *v.* Hunt and Others.

Stable, J. 3rd September, 1940.

Insurance (*motor car*)—*Proposal form—Unqualified negative as reply to question—Effect—Action claiming declaration that insurers entitled to avoid policy—Claim established solely by evidence inadmissible against third party—Whether third party bound—Non-disclosure of*

material facts—Insurers' prima facie *right to avoid—Provision in policy that nothing to affect right of persons indemnified—Effect—Road Traffic Act*, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 10.

The plaintiff insurance company undertook by a policy dated the 1st September, 1938, to indemnify the defendant, Charles Hunt, in respect of third-party risks arising out of the use of a motor car. In the proposal form for the policy Charles Hunt answered "No" to three questions. Those answers proved to be untrue having regard to certain facts relating to the defendant's son, John, who was a person who would be likely to drive the insured car. Stable, J., ruled that those answers of the defendant Charles Hunt constituted concealments of material facts and that they were representations of material facts on which the insurance company relied in issuing the policy. In October, 1938, the defendants, Mr. and Mrs. Thorne, were injured in a collision with the insured car while it was being driven by the second defendant. While an action by those persons against the present two defendants was pending, this action was brought, the plaintiffs claiming that they were entitled to avoid the policy on the ground of non-disclosure and/or misrepresentation of material facts in the proposal for the policy, and that they were not liable to indemnity the defendants Thorne in respect of the claim made in their action. The policy provided that the truth of statements made in the proposal form should be a condition precedent to the company's liability to make any payment under the policy; and that, "nothing in this policy . . . shall affect the right of any person indemnified by this policy or of any other person to recover an amount under," *inter alia*, s. 10 of the Road Traffic Act, 1934. By s. 10 (3) of the Road Traffic Act, 1934, "No sum shall be payable by an insurer under . . . this section, if, in an action commenced before . . . the commencement of proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a misrepresentation."

STABLE, J., said that the effect of s. 10 (3) of the Act of 1934 was to deprive third parties to some extent of the advantages conferred on them by subs. (1). That subsection provided that where a liability to a third party arose through the assured's driving of the insured car, the insurer should remain liable to indemnify the third party notwithstanding that he might be entitled to avoid the policy. Section 10 (3), however, provided in effect that the insurer might nevertheless be entitled to avoid the policy by virtue of a right which arose, independently of the policy, from the fact that the policy was obtained by non-disclosure or misrepresentation in respect of a material fact. It was first argued for the defendants, Thorne, that as the plaintiffs relied in support of their claim to relief solely on admissions by the Hunts, they (the Thornes) were entitled to be dismissed from the action; and that as the success of the action was due to evidence which was inadmissible against themselves they were not bound by the judgment given in it. That point failed: By the proviso to s. 10 (3) the third parties were entitled by notice to be made parties to the proceedings, and that course had been taken here. A declaration against the Hunts would bind all parties to the proceedings. With regard to the answers in the proposal form, he (his lordship) after hesitation had come to the conclusion that the answers "No" which had been given did not mean "No, to the best of my knowledge and belief." He agreed with the view expressed in *Zürich General Accident and Liability Insurance Co., Ltd.* v. *Leven* [1940] S.C. 406, that if a proposer for an insurance gave an unqualified negative as an answer that was an assertion first that he had the knowledge which he purported to impart, and secondly that he was imparting that knowledge. Lastly came the question what the words in the policy "Nothing in this policy . . . s. 10" meant. It was not an entirely fantastic conclusion that an insurance company were holding out as an inducement to prospective customers a policy which expressly provided that the insurers would agree to restriction or abandonment of their rights under s. 10 (3). The plaintiffs had succeeded in establishing everything necessary to entitle them to the relief sought, but the effect of the provision in question was that their action failed.

COUNSEL: *Samuels*, K.C., and *Berryman*; *Thesiger*; *Pritt*, K.C., and *Turner-Samuels*.

SOLICITORS: *Hewitt, Woollacott & Chown*; *R. I. Lewis & Co.*; *Silverman & Livermore*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Books Received.

Tax Cases. Vol. XXIII. Part III. London, H.M. Stationery Office. Price 1s. net.

A.R.P. and All That. Compiled by C. KENT WRIGHT. Illustrated by EVE SHELDON WILLIAMS. Foreword by Admiral Sir E. A. G. EVANS, K.C.B., D.S.O., LL.D. 1940. Crown 8vo. pp. 130. London: George Allen & Unwin, Ltd. Price 2s. 6d. net.

The Ancestral Child. By MARGERY FRY, LL.D., J.P. The Fifth Clarke Hall Lecture. pp. 47. London: The Clarke Hall Fellowship. Price, Cloth bound, 1s. net. Art paper bound, 6d. net.

On Circuit, 1924–1937. By Sir FRANK DOUGLAS MACKINNON, Lord Justice of Appeal. 1940. Royal 8vo. pp. 311 (with Index). London: Cambridge University Press. Price 18s. net.

War Legislation, 1940. Edited by JOHN BURKE, Barrister-at-Law. Special Taxation Part, by N. E. MUSTOE, M.A., LL.B., Barrister-at-Law. London: Hamish Hamilton (Law Books), Ltd.

The Conduct and Procedure at Public, Company and Local Government Meetings. By ALBERT CREW, of Gray's Inn and the Middle Temple, Barrister-at-Law. 1940. Crown 8vo. pp. xxxii and (with Index) 422. London: Jordan and Sons, Ltd. Price 8s. 6d. net.

Rules and Orders.

S.R. & O., 1940, No. 1998/L.37.

LAND CHARGES, ENGLAND.

THE LAND CHARGES RULES, 1940, DATED NOVEMBER 15, 1940, MADE BY THE LORD CHANCELLOR UNDER THE LAND CHARGES ACT, 1925 (15 & 16 GEO. 5. C. 22).

Whereas it is provided by subsection (1) of section 4 of the Law of Property (Amendment) Act, 1926,* that any person intending to make an application for the registration of any contemplated charge, instrument, or other matter in pursuance of the Land Charges Act, 1925, or any Rule made thereunder, may give a priority notice in the prescribed form at least two days before the registration is to take effect:

And whereas it is provided by subsection (2) of the said section 4 that where a purchaser has obtained an official certificate of the result of search, any entry which is made in the Register after the date of the certificate and before the completion of the purchase, and is not made pursuant to a priority notice entered on the Register before the certificate is issued, shall not, if the purchase is completed before the expiration of the second day after the date of the certificate, affect the purchaser:

And whereas it is provided by subsection (4) of the said section 4 that Rules may be made under the Land Charges Act, 1925, for (amongst other things) varying the number of days fixed by the said section 4:

Now, therefore, I, John Viscount Simon, Lord High Chancellor of Great Britain, in exercise of the powers conferred on me by section 19 of the Land Charges Act, 1925, as extended by section 4 of the Law of Property (Amendment) Act, 1926, and of all other powers enabling me in this behalf, Do hereby make the following General Rules:—

1.—(1) The number of days prescribed by subsection (1) of section 4 of the Law of Property (Amendment) Act, 1926, for the giving of a priority notice under that subsection shall be varied from at least two days to at least fourteen days before the registration is to take effect.

(2) The number of days before the expiration of which a purchase must be completed in order to give a purchaser who has obtained an official certificate of search the protection provided for by subsection (2) of the said section 4 shall be varied from two days to fourteen days after the date of the certificate.

2.—(1) These Rules may be cited as the Land Charges Rules, 1940.

(2) These Rules shall come into operation on the twenty-fifth day of November, 1940.

Dated the fifteenth day of November, 1940.

Simon, C.

* 16 & 17 Geo. 5, c. 11.

War Legislation.

(*Supplementary List, in alphabetical order, to those published week by week in* THE SOLICITORS' JOURNAL *from the 16th September, 1939, to the 23rd November, 1940.*)

STATUTORY RULES AND ORDERS, 1940.

E.P. 1979. **Acquisition of Securities** (No. 6) Order, November 16.

No. 2008. **Air Navigation** (Restriction in Time of War) (Amendment) Order, November 14.

E.P. 2005. **Compound and Mixed Feeding Stuffs** (Control) (No. 2) Order, 1940. Amendment Order, November 18.

E.P. 1994. **Control of Communications** (Isle of Man) Order (No. 2), November 14.

E.P. 1996. **Control of Paper** (No. 29) Order, November 18.

E.P. 2003. **Defence** (Local Defence Volunteers) Regulations, 1940. Order in Council, November 19, amending Regulation 2.

No. 1992. **Explosive Substance.** Order in Council, November 8, 1940, amending Order in Council (No. 6) relating to Stores Licensed for Mixed Explosives.

E.P. 1993. **Factories** (Canteens) Order, November 11.

No. 1998. **Land Charges Rules,** November 15.

E.P. 1984. **Limitation of Supplies** (Woven Textiles) (No. 3) Order, November 15.

E.P. 2006. **Milk** (Retail Delivery) Restriction Order, 1940. Amendment Order, November 18.
E.P. 1987. **Removal of Offices** (General Register and Record Office of Seamen) Order, November 16.
E.P. 1997. **Shoeburyness Gas Order,** November 12.
No. 1983/L.36. **Supreme Court Rules** (No. 8), November 14.
No. 1995. **Unemployment Assistance** (Determination of Need and Assessment of Needs) (Amendment) Regulations, November 4.
No. 1977. **Wild Birds Protection** (Administrative County of West Suffolk) Order, November 6.

[E.P. indicates that the Order is made under Emergency Powers.]

STATIONERY OFFICE.

Emergency Acts and Statutory Rules and Orders, 1940, List of Supplement 32, November 14.

Copies of the above S.R. & O.'s, etc., can be obtained through The Solicitors' Law Stationery Society, Ltd., 22, Chancery Lane, London, W.C.2, and Branches.

Parliamentary News.

PROGRESS OF BILLS.

HOUSE OF LORDS.

Scottish Fisheries Advisory Council Bill (H.L.).
Read Second Time. [27st November.

HOUSE OF COMMONS.

Expiring Laws Continuance Bill (H.C.)
Read First Time. [27th November.
Outlawries Bill (H.C.).
Read First Time. [21st November.
Railways Agreement (Powers) Bill (H.C.).
Read First Time. [27th November.

Legal Notes and News.

Honours and Appointments.

Sir HERBERT CUNLIFFE, K.C., has been elected Treasurer of Lincoln's Inn for the year commencing 11th January.

Mr. GODFREY PHILLIPS, of Stamford, has been appointed Coroner for South Kesteven (Lincs) in succession to Major C. W. Bell, of Bourne, who has retired.

Mr. T. HOLLIS WALKER, C.M.G., K.C., has been elected Treasurer of the Inner Temple for the year 1941, and Mr. F. P. M. SCHILLER, K.C., has been elected Reader for the Lent Vacation.

The India Office announce that the King has been pleased to approve the appointment of Mr. GHULAM HASAN BUTT as a Judge of the Oudh Chief Court on the retirement in December of Mr. Zia-ul-Hasan.

Captain A. C. D. Ensor has resigned from his position as Clerk of the Peace at the County of London Sessions, the resignation to take effect from the end of the year. He will be succeeded by Mr. CLARKSON LEO BURGESS, barrister-at-law, who is at present Clerk of Arraigns at the Central Criminal Court. Mr. Burgess was called to the Bar by the Middle Temple in 1927.

Notes.

The text of the Factory Canteens Order has now been issued. It provides that in any factory engaged on work on behalf of the Crown, and employing more than 250 persons, the Chief Inspector of Factories, acting on behalf of the Minister of Labour and National Service, may require the provision of a canteen. The canteen must be "in, or in the immediate vicinity of, the factory," and hot meals must be provided.

It is announced by the Home Office that the consideration of applications for naturalisation has been suspended until further notice, subject to the following exceptions: (1) applications from women who lost their British nationality on marriage and whose marriages have been terminated, (2) applications from British-born women who are married to aliens of enemy nationality, and (3) exceptional cases where naturalisation is a matter of direct national interest.

Wills and Bequests.

Mr. William Stanley Hitchins, solicitor, of Burnham, Bucks, and Savile Place, W., left £41,215, with net personalty £35,945.

Mr. Joseph Henry Rice, solicitors' managing clerk, of Birmingham, left £24,055, with net personalty £23,978.

Mr. John Harold Youll, solicitor, of Newcastle-on-Tyne, left £21,686, with net personalty nil.

Court Papers.

SUPREME COURT OF JUDICATURE.

MICHAELMAS SITTINGS, 1940.

ROTA OF REGISTRARS IN ATTENDANCE ON

DATE.	EMERGENCY ROTA.	APPEAL COURT NO. I.	MR. JUSTICE FARWELL.
	Mr.	Mr.	Mr.
Dec. 2	More	Jones	Andrews
,, 3	Blaker	Ritchie	Jones
,, 4	Andrews	More	Ritchie
,, 5	Jones	Blaker	More
,, 6	Ritchie	Andrews	Blaker
,, 7	More	Jones	Andrews

	GROUP A.		GROUP B.	
DATE.	MR. JUSTICE BENNETT.	MR. JUSTICE SIMONDS.	MR. JUSTICE CROSSMAN.	MR. JUSTICE MORTON.
	Witness.	Non-Witness.	Witness.	Non-Witness.
	Mr.	Mr.	Mr.	Mr.
Dec. 2	Andrews	Blaker	More	Ritchie
,, 3	Jones	Andrews	Blaker	More
,, 4	Ritchie	Jones	Andrews	Blaker
,, 5	More	Ritchie	Jones	Andrews
,, 6	Blaker	More	Ritchie	Jones
,, 7	Andrews	Blaker	More	Ritchie

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (26th October, 1939) 2%. Next London Stock Exchange Settlement, Thursday, 5th December, 1940.

	Div. Months.	Middle Price 27 Nov. 1940.	Flat Interest Yield.	‡ Approximate Yield with redemption.
ENGLISH GOVERNMENT SECURITIES.			£ s. d.	£ s. d.
Consols 4% 1957 or after	FA	111¼	3 11 11	3 1 10
Consols 2½%	JAJO	76	3 5 9	—
War Loan 3½% 1955–59	AO	101	2 19 5	2 18 2
War Loan 3½% 1952 or after	JD	101⅜	3 8 9	3 6 5
Funding 4% Loan 1960–90	MN	113½	3 10 6	3 1 1
Funding 3% Loan 1959–69	AO	98½	3 0 11	3 1 7
Funding 2½% Loan 1952–57	JD	98	2 16 1	2 18 0
Funding 2½% Loan 1956–61	AO	92½	2 14 1	3 0 0
Victory 4% Loan Average life 21 years	MS	111½	3 11 9	3 4 8
Conversion 5% Loan 1944–64	MN	107⅞	4 12 10	2 12 1
Conversion 3½% Loan 1961 or after	AO	102	3 8 8	3 7 2
Conversion 3% Loan 1948–53	MS	102⅜	2 18 4	2 11 4
Conversion 2½% Loan 1944–49	AO	99½	2 10 3	2 11 5
National Defence Loan 3% 1954–58	JJ	102	2 18 10	2 16 7
Local Loans 3% Stock 1912 or after	JAJO	88½	3 7 10	—
Bank Stock	AO	332	3 12 3	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	80	3 7 5	—
India 4½% 1950–55	MN	108	4 3 4	3 10 0
India 3½% 1931 or after	JAJO	94	3 14 6	—
India 3% 1948 or after	JAJO	81½	3 13 7	—
Sudan 4½% 1939–73 Average life 27 years	FA	110	4 1 10	3 18 0
Sudan 4% 1974 Red. in part after 1950	MN	106	3 15 6	3 5 9
Tanganyika 4% Guaranteed 1951–71	FA	109	3 13 5	2 19 0
Lon. Elec. T. F. Corpn. 2½% 1950–55	FA	93	2 13 9	3 1 9
COLONIAL SECURITIES.				
•Australia (Commonwealth) 4% 1955–70	JJ	105	3 16 2	3 11 4
Australia (Commonwealth) 3½% 1964–74	JJ	94	3 9 2	3 11 2
Australia (Commonwealth) 3% 1955–58	AO	91	3 5 11	3 13 11
•Canada 4% 1953–58	MS	111	3 12 1	2 19 3
New South Wales 3½% 1930–50	JJ	100	3 10 0	3 10 0
New Zealand 3% 1945	AO	95	3 3 2	4 5 1
Nigeria 4% 1963	AO	105	3 16 2	3 13 6
Queensland 3½% 1950–70	JJ	97	3 12 2	3 13 4
•South Africa 3½% 1953–73	JD	102	3 8 8	3 6 3
Victoria 3½% 1929–49	AO	99	3 10 8	3 12 7
CORPORATION STOCKS.				
Birmingham 3% 1947 or after	JJ	82	3 13 2	—
Croydon 3% 1940–60	AO	92½	3 4 10	3 11 1
Leeds 3½% 1958–62	JJ	95	3 8 5	3 11 8
Liverpool 3½% Redeemable by agreement with holders or by purchase	JAJO	96	3 12 11	—
London County 3% Consolidated Stock after 1920 at option of Corporation	MJSD	84	3 11 5	—
London County 3½% 1954–59	FA	103	3 8 0	3 4 7
Manchester 3% 1941 or after	FA	83	3 12 3	—
Manchester 3% 1958–63	AO	93½	3 4 2	3 8 1
Metropolitan Consolidated 2½% 1920–49	MJSD	98	2 11 0	2 14 11
Met. Water Board 3% "A" 1963–2003	AO	84½	3 11 0	3 12 6
Do. do. 3% "B" 1934–2003	MS	87	3 9 0	3 10 4
Do. do. 3% "E" 1953–73	JJ	90	3 6 8	3 10 3
Middlesex County Council 3% 1961–66	MS	91½	3 5 7	3 10 3
•Middlesex County Council 4½% 1950–70	MN	105	4 5 9	3 16 8
Nottingham 3% Irredeemable	MN	81½	3 13 7	—
Sheffield Corporation 3½% 1968	JJ	100	3 10 0	3 10 0
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS.				
Great Western Rly. 4% Debenture	JJ	106	3 15 6	—
Great Western Rly. 4½% Debenture	JJ	114½	3 18 7	—
Great Western Rly. 5% Debenture	JJ	121½	4 2 4	—
Great Western Rly. 5% Rent Charge	FA	114½	4 7 4	—
Great Western Rly. 5% Cons. Guaranteed	MA	111	4 10 1	—
Great Western Rly. 5% Preference	MA	84	5 19 1	—

• Not available to Trustees over par.
‡ In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.